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RECEIVED

June 24, 1998

Office of the Secretary
19 19 M Street NW, Room 222
Washington, D.C. 20554

RE: Docket # 96-198

Dear Sir or Madame:

Please find attached a copy of the Governor's Council on Disability's response to Docket # 96-198. The mission of the Governor's Council on Disability is to provide leadership and support so that Missourians with disabilities can achieve equal opportunity and independence. Also, by statute, the Governor's Council on Disability is charged with advocating for public policies and practices which, among other things, expand opportunities in all aspects of life. (Missouri Revised Statutes, Section 286.205 (3) (b).)

Thus, with that in mind, please find enclosed comments and four copies of the same.

Sincerely,

William D. Goren
Executive Director

WDG:cmb

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*Keeping the Promise of the Americans with Disabilities Act
Affiliated with the President's Committee on Employment of People with Disabilities*

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This memorandum is being written in response to the FCC's requests for comments about the regulations implementing Section 255 of the Telecommunications Act, Docket #96-198.

1. The Governor's Council on Disability (hereafter GCD) has several concerns with the FCC's discussion of how "readily achievable" will be determined. For example, the term "opportunity costs," used in paragraph 104, is vague and would not offer much comfort to the person with a disability denied access to telecommunication devices. As a general matter, instead of the discussion of how the FCC will determine "readily achievable," (specific points to be discussed below), GCD suggests the FCC adopt the criterion for determining what is "readily achievable" as found in the Americans with Disabilities Act (ADA) itself. (See 42 USC, 12181 (9) (A), (B), (C), (D)). Adopting the statutory language for determining "readily achievable" is consistent with the intent of the Telecommunications Act that "readily achievable" mean the same as what is found in the ADA.
2. In paragraph 106, GCD is concerned about the FCC's use of the term "practicality" as another part of the calculus for determining "readily achievable." In particular, GCD has reservations about the implications of having to analyze the "potential market" in order to assess "practicality." GCD is concerned that since persons with disabilities are a minority of the population, the potential market for persons without disabilities will always be larger. Thus, if "potential market" is the criteria, the person with a disability is likely to lose. GCD is also concerned that determining the "potential market" will necessitate a complex undertaking that is beyond the resources of many persons with disabilities.
3. Another standard used by the FCC in determining "readily achievable," appears in paragraph 106: "The degree to which the provider would recover the incremental cost of the accessibility feature." While, GCD recognizes that private industry must make a profit, GCD wishes to point out that allowing the recovery of incremental costs is a concept significantly different from the ADA. Under the ADA, the focus is to get the person with a disability to the same starting line as the person without a disability. Incremental costs to the employer or the business owner is not relevant except as it might demonstrate an undue hardship, undue burden, or not being readily achievable. Further, allowing the recovery of incremental costs also has the pernicious effect of having the person with a disability pay for the costs of the accommodation, something which the Americans with Disabilities Act does not countenance. (See, McGarry v. Director, Department of Revenue, State of Missouri, #96-4249-CV-C-66BA, WD MO, Central Division, decided 5/20/98). GCD has the identical concern with paragraph 115 where the FCC says it is appropriate to consider whether the company can recover the costs of increased accessibility. Again, such an approach is akin to having the person with a disability pay for the accommodation in contravention of the principles underlying the ADA. (Id.)

4. With respect to paragraph 122, GCD applauds the FCC's decision that a grace period for compliance is not warranted. Accessibility to telecommunication devices is a problem that must be addressed now. For example, the Executive Director of this agency is currently unable to use portable cellular phones because of his need to use hearing aids to compensate for a severe to profound hearing loss.
5. In paragraph 128, GCD seeks clarification on whether a person complaining about accessibility of a product would have to first exhaust his or her options with the product manufacturer before he or she could file with the FCC.
6. With respect to the query posed by the FCC in paragraph 134 regarding the publicizing of the contact list, GCD supports making the list public and wants to encourage that the list be published in such a way so that its availability to the public is maximized.
7. GCD applauds the FCC's decision in paragraph 148 not to impose a standing requirement. Such a decision is entirely consistent with the ADA. For example, Title III of the ADA allows any person aware of potential disability discrimination to sue for injunctive relief. (See, 42 USC 12188(a)(1).)
8. The FCC's proposed rules beginning at paragraph 154 raise a larger issue of which GCD is very concerned. That is Section 255 of the Telecommunications Act is very complex and the defenses are even more so. Thus, absent the ability of the person with a disability to procure effective representation, the rights of the person with a disability as a practical matter are zero. This is especially critical here as no private cause of action exists and many persons with disabilities lack the resources to pay for private representation absent a private cause of action. Thus, GCD believes that the FCC must develop a program to ensure that persons with disabilities are able to procure effective counsel/advocacy with respect to pursuing their rights under Section 255.
9. Since the representation issues are so severe, GCD strongly encourages the use of alternative dispute resolution, particularly mediation, to resolve disputes. While mediation does not solve the skillful representation issue, it does give the person with a disability the opportunity to be heard and to have the possibility of achieving a satisfactory resolution.
10. GCD applauds the FCC decision in paragraph 155 to not require a filing fee for informal or formal resolution of complaints as the unfortunate fact is that many people with disabilities would not have the financial ability to pay such a fee.
11. In paragraph 159, the FCC asks whether ADR should be permitted at anytime. GCD believes that ADR should be available at any time. In light of the nature of the disparity in bargaining position between the person with a disability and the

manufacturer, the ability to have ADR at any time gives the parties maximum flexibility to reach win-win situations.

12. In paragraph 159, the FCC asks whether a system should be set up with regards to selecting a mediator or should it be left up to the parties to select a mediator? Due to the aforementioned unequal bargaining positions of the likely disputants in a Section 255 matter, GCD supports the FCC establishing a particular method or methods for selecting the ADR neutral.
13. Also, in paragraph 159, the FCC asks what role they should take in a Section 255 ADR process? GCD believes the FCC would do well to adopt the same procedures utilized by the EEOC in ADR matters arising under the ADA. In such situations, the EEOC signs any mediated agreement. By doing that, the EEOC then has the ability to pursue matters further should the agreement not hold.
14. In paragraph 167, the FCC seeks input on whether firms covered by Section 255 should be required to inform consumers regarding accessibility issues and information about how they can contact the FCC. GCD supports such a notice because otherwise persons with disabilities will not know how their rights can be vindicated.

GCD is delighted to have this opportunity to be of service.